

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EDWARD C. DONOVAN,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
IRA MARK TROCKI, M.D.	:	No. 97-00970
Defendant.	:	

MEMORANDUM-ORDER

Before the Court is Defendant's Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56(c) and Plaintiff's response thereto. Defendant asserts summary judgment is appropriate because Plaintiff (1) did not file a complaint within the two (2) year New Jersey statute of limitations, and (2) did not present sufficient evidence to support a cause of action against Defendant. For the following reasons, Defendant's Motion for Summary Judgment will be denied.

FACTUAL AND PROCEDURAL HISTORY

On August 29, 1994, Plaintiff Edward C. Donovan pierced his left foot with a piece of wood which necessitated an emergency visit to the Shore Memorial Hospital in Northfield, New Jersey. (See Compl. at 4). The hospital staff administered a tetanus shot but were unable to remove the piece of wood from Plaintiff's foot. The hospital then referred Plaintiff to a plastic surgeon, Defendant Ira Mark Trocki, M.D., of Northfield, New Jersey. Later that day Defendant performed a surgical procedure to remove the wood.

Plaintiff alleges that the surgery was performed by, and under the direction of, Defendant and that Claudia Resch, M.D., Defendant's alleged employee, participated in the procedure. (See Compl. at 4 through 9). Plaintiff claims that after the procedure Defendant informed him the

wood had been removed from his foot. Upon referral by his personal physician Plaintiff visited a foot specialist, Michael Grossman, D.M.D., for an examination. Dr. Grossman advised Plaintiff that his foot was infected and required reopening and cleaning of the affected areas. Dr. Grossman performed an emergency surgery and removed four (4) additional pieces of wood from Plaintiff's left foot. Plaintiff claims the four (4) pieces of wood which remained in his foot after Defendant treated him caused an infection that has not been completely eradicated. Plaintiff alleges that he has experienced considerable pain and suffering as a result of the infection.

Plaintiff reportedly met with his attorney, James N. Gross, to discuss his dissatisfaction with the care he received from Defendant. (See Pl.'s Dep. at 90, lines 24-25; at 91, lines 1-9). Plaintiff subsequently filed a Writ of Summons in the Court of Common Pleas of Delaware County, Pennsylvania on August 26, 1996. On October 24, 1996, Plaintiff filed a civil complaint against Defendant for negligence in performing the surgery. In response, Defendant filed a motion to dismiss Plaintiff's Complaint for lack of personal jurisdiction over Defendant, subject matter jurisdiction, and/or venue. The court granted Defendant's motion on January 23, 1997 as to personal jurisdiction and/or venue and dismissed Plaintiff's Complaint with prejudice. On February 24, 1997, the court amended its order and dismissed Plaintiff's Complaint without prejudice. The present case commenced on February 7, 1997 when Plaintiff filed a diversity action against Defendant.

DISCUSSION

A moving party is entitled to summary judgment where there is no genuine issue of material fact. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986). The moving party bears the burden of proving that there is no genuine issue of material fact in dispute. See Celotex

Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if it affects the outcome of the litigation when applied to substantive law. Anderson, 477 U.S. at 247-248.

A. Statute of Limitations

A federal court exercising diversity jurisdiction must apply the substantive law of the state whose laws govern the action. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). It has been established that substantive law includes statutes of limitations. See McGowan v. University of Scranton, 759 F.2d 287, 290 (3d Cir. 1985) (citing Guaranty Trust Co. v. York, 326 U.S. 99, (1945)); see also Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 552 (3d Cir.1985). Both parties concede that New Jersey law governs the present dispute because the alleged negligence occurred in New Jersey. (See generally, Pl.'s Reply ; Def.'s Reply). Therefore, it is necessary to examine the law in New Jersey.

Under New Jersey law, a cause of action for personal injury arising out of negligence must be brought within two years. See N.J.S.A § 2A: 14-2.¹ The statutory period begins to run once the plaintiff discovers the injury. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994). The doctrine of equitable tolling, however, stops the statute of limitations from running under certain circumstances. See Id. at 1387 (citing Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (3d Cir. 1991)). There are three principal, though not exclusive, situations in which a statute of limitations may be tolled: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff, in some extraordinary way, has been prevented from asserting his or her rights; or (3) where the

¹ New Jersey Statute, N.J.S.A § 2A:14-2, requires every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within New Jersey to be commenced within 2 years next after the cause of any such action shall have accrued.

plaintiff has timely asserted his or her rights mistakenly in the wrong forum. Oshiver, 38 F.3d at 1387.

The basic question to be answered in determining if a statute of limitations should be tolled, is whether the legislature intended the right to be enforceable after the prescribed time. See Burnett v. New York Center Railroad Company, 380 U.S. 424, 427 (1965) (citations omitted). In order to determine congressional intent, the court must examine the purposes and policies underlying the statute of limitations, the statute itself, and the remedial scheme developed for the enforcement of the rights given by the statute. Id. at 427.

In New Jersey, the primary purpose for statutes of limitations is to compel exercise of right of action within reasonable time so that opposing party has fair opportunity to defend. See Galligan v. Westfield Centre Serv., Inc., 412 A.2d 122, 124 (N.J. 1980); see also Kaczmarek v. New Jersey Turnpike Authority, 390 A.2d 597, 601 (N.J. 1978). Another purpose is to stimulate litigants to pursue their causes of action diligently and to prevent litigation of stale claims. See Kaczmarek, 390 A.2d at 602 (citations omitted).

The New Jersey Supreme Court has held that statutes of limitations will not be applied when they unnecessarily sacrifice individual justice. See Zaccardi v. Becker, 440 A.2d 1329 (N.J. 1982). Nevertheless, in a diversity suit, a federal court is not bound by the equitable remedies that are available in state court. See Guaranty Trust, 326 U.S. at 104. Rather, equitable relief in a federal court must simply be within the traditional scope of equity. Id. As a matter of equity, the Third Circuit has recognized that statutes of limitations can be tolled for plaintiffs who timely assert their rights mistakenly in the wrong forum. See School District of City of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d Cir. 1981); see also Oshiver, 38 F.3d at 1386.

In the present case, the two (2) year statute of limitations for filing a negligence action was tolled when Plaintiff mistakenly filed a complaint in a Pennsylvania state court during the statutory period. It is undisputed that Plaintiff's cause of action arose on or about August 29, 1994. (See Pl's Reply; Def's Reply). Therefore, Plaintiff was required to file suit within two (2) years of that date. (See N.J.S.A. § 2A:14-2). Plaintiff satisfied the New Jersey statute of limitations by filing his complaint in a Pennsylvania court on August 26, 1996.² The New Jersey statute was effectively tolled, however, when Plaintiff's timely Complaint was dismissed for lack of personal jurisdiction over Defendant and/or venue.

Equitable tolling is appropriate in the instant matter because the purpose and policies of the New Jersey statute are met by the timely filing of Plaintiff's complaint in state court and by the lack of any appreciable passage of time before the action was filed in federal court. See Galligan, 412 A.2d at 125.³ Contrary to Defendant's argument, that fact that Plaintiff served Defendant in New Jersey does not, in and of itself, support the contention that Plaintiff was aware he was filing in the wrong forum. Viewing the facts and inferences in the light most favorable to Plaintiff, Defendant simply has not presented any evidence as to Plaintiff's state of mind in filing his complaint in state court. Therefore, equitable tolling of the New Jersey statute of limitations is appropriate, and Defendant's Motion for Summary Judgment will be denied.

² Contrary to Defendant's argument, Plaintiff also satisfied Pennsylvania's statute of limitations by filing his complaint on August 26, 1996. The Pennsylvania statute of limitations states in part that an action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another must be commenced within two (2) years. See 42 Pa. C.S.A. § 5524(2).

³ Although Galligan involved the dismissal of a plaintiff's complaint in federal court rather than a dismissal in state court, the basic principle held in Galligan applies to the present matter. The court held that a plaintiff should be given the opportunity to assert his or her claim if dismissing the complaint impedes the Legislature's objectives in prescribing the limitation. Specifically, the court held that filing of the complaint "within the limitations period does no violence to the purposes underlying N.J.S.A. § 2A:14-2." Galligan, 412 A.2d at 125.

B. Sufficiency of the Evidence

Summary judgment may be entered if "the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56 (c). The moving party must show that there is an absence of evidence to support the claims of the nonmoving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (quotations omitted).

In the present case, Defendant asserts that summary judgment is warranted because Plaintiff failed to put forth sufficient evidence to show that Dr. Trocki is the proper defendant. First, Defendant presents deposition testimony to show that he was not involved in the surgical procedure. (See Resch's Dep. at 18, lines 11-15). In response, Plaintiff presents deposition testimony to show that Defendant was involved in the surgical procedure in at least two (2) instances. (See Pl.'s Dep. at 38-43). Second, Defendant claims the evidence reveals that the alleged malpractice was committed by a company employee, Dr. Resch, and not by Defendant. (See Resch's Dep. at 8, lines 1-25; at 18, lines 4-24). Although Plaintiff concedes that the procedure was also performed by Dr. Resch, Plaintiff asserts that Dr. Resch's testimony confirms that she is an employee of Defendant. (See Resch's Dep. at 30). Therefore, under the theory of respondeat superior, Plaintiff contends that Defendant would still be liable for the alleged malpractice of Dr. Resch.

At the summary judgment stage, "the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp., 812 F.2d 141, 144 (3d

Cir. 1987) (citing Anderson, 477 U.S. at 250). Generally, summary judgment is denied when there is conflicting evidence as to material facts. See, e.g., Rosenthal v. Rizzo, 555 F.2d 390, 393 (3d Cir. 1977), Clyde v. Hodge, 413 F.2d 48, 51 (3d Cir. 1969). Plaintiff maintains a cause of action against Defendant because there is a genuine issue of material fact regarding Defendant's involvement in the surgical procedure and the employment status of Dr. Resch. Although Defendant presents evidence contrary to that of Plaintiff, Defendant has failed to satisfy his burden of proving that there is no genuine issue of material fact in dispute. Evidence presented by Defendant merely conflicts, but does not refute, the evidence presented by Plaintiff. The depositions offered by Defendant present a different account of the facts but does not show that depositions offered by Plaintiff are any less valid. Accordingly, Defendant's Motion for Summary Judgment will be denied.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EDWARD C. DONOVAN,
Plaintiff,

v.

IRA MARK TROCKI, M.D.
Defendant.

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:
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CIVIL ACTION

No. 97-00970

ORDER

AND NOW, this 4th day of August, 1998 upon consideration of Defendant's Motion for Summary Judgment and Plaintiff's response thereto, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is DENIED.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.